No. 84-302

(5)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE HONORABLE ALCEE L. HASTINGS,
Petitioner,

v.

INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT

and

THE UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For the Eleventh Circuit

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PETITION FOR REHEARING

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OCTOBER 16, 1984

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PETITION FOR REHEARING

Petitioner asks that this Court vacate its order denying his Petition for Writ of Certiorari (the "Petition"). The Office of the Clerk of this Court erroneously distributed the Petition to the Court two weeks before the time for filing a brief in opposition had expired. As a result the Court acted upon the Petition prematurely and only

one week after a forty-eight page Brief in Opposition[1] had been filed and distributed to the Court. That error deprived petitioner of any opportunity to respond to matters first raised in the Brief in Opposition.

With this Petition for Rehearing, counsel for petitioner has submitted the Motion[2] and the Reply[3] that he had prepared and that would have been before the Court when it considered the Petition had the Rules and normal practices of this Court been followed. The Motion and the Reply set forth matters that the Court should have considered before it acted on the Petition. Moreover,

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1 Brief of Respondent Investigating Committee of the Judicial Council of the Eleventh Circuit in Opposition to Petition for Writ of Certiorari.

2 Motion Requesting that the Court Defer Consideration of the Petition and Request that the United States Respond to the Petition (the "Motion").

3 Petitioner's Reply to Brief of Respondent Investigating Committee of the Judicial Council of the Eleventh Circuit ini Opposition to Petition for Writ of Certiorari (the "Reply").

petitioner submits that the Court should not permit an inadvertent departure from its normal practices to create an impression in this case that a petitioning federal judge seeking relief from actions that his more senior judicial colleagues initiated did not receive the same consideration that this Court routinely gives other litigants who petition it for relief. Accordingly, petitioner submits that this Court should now vacate its premature order and reconsider the Petition with the Motion and the Reply before it.

1. Statement of Facts Justifying Rehearing.

The Petition was filed in this Court on Saturday, August 25, 1984, and served on counsel for the respondents by mail. The Petition named two respondents. The first, the Investigating Committee of the Judicial Council of the Eleventh Circuit (the "Committee"), was the party who had petitioned

for access to the grand jury materials below. The second, the United States of America, had responded in the proceedings below, through the Criminal Division of its Justice Department, as the custodian of the grand jury materials. Each respondent had its own counsel below.[4]

On Tuesday, September 11, the Solicitor General filed a Waiver advising the Court that the "government" would not file a response to the Petition unless requested to do so. The Clerk's office has since informed counsel for petitioner that that Office misperceived the scope of that waiver and distributed the Petition to the Court on Wednesday, September 12, and placed it on the list of cases to be acted upon at the Court's

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[4] It became clear that each would be separately represented in this Court on August 30, 1984. On that day counsel for the Committee filed an Application for Order Vacating Stay addressed to Justice Powell as Circuit Justice for the Eleventh Circuit. Justice Powell denied that Application on September 6, and the Clerk so advised counsel for each of the parties.

conference three Fridays later, on October 5, 1984.

It was not until Thursday, September 27, that the Committee filed its forty-eight (48) page Brief in Opposition.[5] That brief accused counsel for petitioner of presenting questions that were not "fairly raised by the record" (Br. Opp. at i-ii) and used that characterization in arguing that the Petition should be denied (id. at 35-43).

Petitioner received his copy of the Committee's Brief in Opposition on October 2, 1984[6] and immediately determined that a response was necessary. On October 4, he sent

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[5] The Clerk's office reported that the Brief in Opposition was promptly distributed to the Court.

[6] Counsel for petitioner does not suggest that the delay in receipt was attributable to any defect in service by the Committee. He is not aware of the method of service employed, but he has experienced internal delays attributable to the University's mail distribution system. He reports the fact only to emphasize the types of problems that must arise if the Court's rules and normal practices governing the distribution of certiorari petitions are not strictly observed.

a letter by Federal Express to the clerk of the court of appeals asking that the record below be certified and transmitted to this Court pursuant to Rule 19.1. By copy of that letter, he asked the Clerk of this Court to advise the Court that that request had been made.[7] Counsel promptly drafted the Motion and the Reply that now accompany this Petition for Rehearing.

On Tuesday, October 9, counsel for petitioner learned that this Court had entered an order denying the Petition. That afternoon, in response to counsel's inquiries, the Clerk's staff informed him that the Petition had been distributed to the Court on the day after the Solicitor General had filed the government's waiver and simultaneously had been placed on that list of cases to be acted upon at the Court's conference three Fridays later, on October 5.

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[7] A copy of that letter is included in an Apendix to the Motion (App. to Mot. at 1a-5a).

The next day, October 10, 1984, counsel for petitioner dispatched by Federal Express an Application to Suspend Order Denying Petition for Writ of Certiorari Pending the Filing and Disposition of a Petition for Rehearing addressed to Justice Powell as Circuit Justice for the Eleventh Circuit. Copies of the draft Motion and Reply were appended to that Application. Petitioner now submits this Petition for Rehearing accompanied by the Motion and the Reply.

2. Reasons why Rehearing Should be Granted.

a. The normal practices and procedures for handling petitions for writ of certiorari are prescribed by the Court's Rules. Rule 22 provides in relevant part:

> 1. Respondent shall have 30 days . . . after receipt of a petition, within which to file . . . an opposing brief . . . .
>
> * * *
>
> 4. Upon the filing of a brief in opposition, or the expiration of the time allowed therefore, or express waiver of the right to

> file, the petition and brief, if any, will be distributed by the Clerk to the Court for its consideration . . . .
>
> 5. A reply brief addressed to arguments first raised in the brief in opposition may be filed by any petitioner but distribution under paragraph 4 will not be delayed pending the filing of any such brief.

Rule 22, Rules of the Supreme Court of the United States (emphasis added).

The Petition in this case was distributed at least two weeks before the Committee's time to file a brief in opposition had expired and more than two weeks before the Committee's Brief in Opposition was in fact filed.[8] The premature distribution caused the Petition to be scheduled for

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[8] As a courtesy, counsel for petitioner served the Petition on counsel for the Committee by express mail, anticipating that he might seek to have the stay vacated. The Petition was served upon the Solicitor General by first class mail, and counsel for petitioner does not know by what date the Petition had been received by both counsel for the Committee and the Solicitor General's office as required by Rule 28.4(a) of this Court's Rules.

consideration and action by the Court at least two weeks before it should have begun under the Court's normal practices.[9] As a

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[9] As counsel understands the normal practice, the Clerk's office determines which petitions are ready for distribution pursuant to Rule 22.4 every Tuesday and distributes the appropriate petitions and briefs in opposition to the Court each Wednesday morning. At the time of distribution, the Clerk's office schedules the petitions so distributed for consideration and disposition at the Court's regular Friday conference sixteen or twenty-three days later.

The Brief in Opposition here was filed on Thursday, September 27. Under the practice as counsel understands it, the Petition and Brief in Opposition would normally have been included in the distribution made on Wednesday, October 3, and scheduled for consideration on Friday, October 19 or 26.

In reviewing petitioner's Application to Justice Powell, one of the deputy clerks suggested that, since 30 days from the date of filing had expired by Tuesday, September 25, the Petition might have been distributed on Wednesday, September 25, and scheduled for conference as early as Friday, October 12, even in the absence of an express waiver by the Committee. That suggestion is inconsistent with Rules 22.1 and 28.4(a) defining the time for filing a brief in opposition and, to the extent counsel can determine, with the actual practices this Court has followed. Such a practice would in any event create an unfortunate potential for "sandbagging" that should not be a part of the practice before this Court.

result, petitioner was deprived of any meaningful opportunity to respond to the serious allegations and arguments first raised on the Brief in Opposition.

b. The Office of the Clerk of this Court has a deserved reputation for accuracy, reliability, and unfailing fairness and courtesy to the parties and counsel who come before the Court. Based upon his occasional experiences over the years, counsel for petitioner fully shares that view. Indeed, had this problem occurred in a different case, counsel probably would have expressed his concerns to the Clerk and let the matters drop without requesting relief from the Court. But this is not an ordinary case, and counsel believes there are two reasons that create a special need for the Court to grant relief here.

First, the Brief in Opposition interjected factual questions into the case and directly challenged the integrity and

professional competence of counsel for petitioner. The Brief in Opposition alleged that counsel had tendered questions not "fairly raised by the record" and accused him of taking positions in the Petition inconsistent with those argued below. No member of the Bar of this Court could fail to reply to such charges if only to fulfill his or her professional duty to assure that the Court had before it that which was essential to enable the Court to resolve factual issues such as those first interjected by the Brief in Opposition. The accompanying Motion and Reply were prepared to achieve that end in this case. Under the rules and normal practice, both would have been before the Court before it acted. Counsel believes that the Court should have had the opportunity to consider them before it acted upon the Petition and submits this Petition for Rehearing so that the Court may exercise that option now. Fundamental fairness to peti-

tioner as well as a proper concern to assure the rules and procedures of this Court are observed thus combine to suggest that rehearing must be granted here.

Second, the premature action in this case has enhanced questions that needed no enhancement. This is a case that has pitted federal judges against a federal judge before federal courts presided over by specially selected and designated judges and that has required those courts to balance the interests of an individual judge against the desires of judges high in the judicial bureaucracy in order to resolve a dispute over the means appropriate to achieve an agreed end: preserving the integrity and independence of the federal courts. Throughout, the concerns over the ability of the presiding judges to maintain the necessary

appearance of impartiality have been real and apparent.

Against that background, this Court should not permit the Petition to be denied in a manner that suggests that a petitioner federal judge, who sought relief from actions that his more senior judicial colleagues initiated, was not accorded the same opportunities to be heard and have his views considered that this Court routinely accords other litigants who petition it for relief.

CONCLUSION

Petitioner respectfully submits that this Court should grant this Petition for Rehearing and vacate the order denying the Petition for Writ of Certiorari in order that it may consider and act upon the Motion and

then consider the Petition with a proper record before it.

Respectfully submitted

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Honorable Alcee L. Hastings,
petitioner.

CERTIFICATE OF COUNSEL

Pursuant to Rule 51.2 of the Rules of the Supreme Court of the United States, the undersigned certifies that:

1. He is a member of the Bar of this Court and is counsel of record for petitioner, the Honorable Alcee L. Hastings;

2. The foregoing Petition for Rehearing is based upon and restricted to substantial grounds not previously presented to the Court that counsel did not know and could not properly have known until October 9, 1984; and

3. The foregoing Petition for Rehearing is submitted in good faith and not for delay.

Terence J. Anderson